82-765

No.

Office - Supreme Court, U.S.
FILED
NOV 3 1982
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1982

IRVING COTLER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

IRVING ANOLIK
20 Vesey Street
New York, New York 10007
(212) 732-3050

-and-

DONALD R. CONWAY
75 Essex Street
Hackensack, New Jersey 07601
(201) 342-1700

Attorneys for Petitioner

7594

LUTZ APPELLATE PRINTERS, INC.
NY (212) 840-9494 • (516) 222-1606 • (914) 683-9363
NJ (201) 257-6850 • PA (215) 563-5587 • DC (202) 783-7288 • MA (617) 542-1114

QUESTIONS PRESENTED

1. Whether petitioner was deprived of due process of law and a fair trial by the denial of his numerous motions for severance, despite the fact that the record reveals such hostility by the other three co-defendants against Cotler as to preclude the possibility of a fair trial?

2. Whether remarks by co-defendants at trial, referring to Cotler's failure to take the stand in his own defense, thus precluding them from cross-examining him, rendered a fair trial impossible, and whether the court below erred in failing to grant a severance, despite its advance awareness that these arguments would be made by co-defendants against Cotler?

3. Whether this Court should, once and for all, resolve the issue left unsettled in *United States v. White,* 401 U.S. 745, as to whether court orders are required for electronic surveillance where only one party to such surveillance has knowledge thereof and consents thereto?

4. Whether the indictment should have been dismissed because "RICO"and "RICO conspiracy" do not apply to "criminal venture" types of enterprises, and the joining of these counts violated Rule 8(b) of the Federal Rules of Criminal Procedure?

5. Whether the Government's use of "RICO" in the case at bar exceeded its statutory scope and purpose?

6. Whether the *nisi prius* court erred in failing to suppress evidence gathered as a result of court-authorized wiretaps and searches, in view of the fact that these failed to satisfy the requirements of *Aguilar* and *Spinelli,* and in view of the fact that the five search warrants issued in reliance upon an affidavit were so overly broad as to constitute "general warrants"?

7. Whether it was error for the trial court to deny petitioner's motion for the psychiatric examination of two key Government witnesses who had manifested serious and aberrant psychiatric and behavioral tendencies and symptoms?

8. Whether the procedures of the grand jury were valid and constitutional since not all of the twelve grand jurors who voted for the indictment attended every session at which evidence was received?

PARTIES

The parties in the court below at trial were the petitioner herein; Nunzio Provenzano, Salvatore Provenzano and Michael Sciarra, as well as the United States of America.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties	iii
Table of Contents	iv
Table of Citations	vi
Opinion Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2

Reasons for Granting the Writ:

I. Petitioner was extremely prejudiced by the refusal of the trial court to grant his motions made pre-trial and during trial, for a severance. The trial judge was well aware that the defenses of the three co-defendants of petitioner at trial were strongly antagonistic to that of Cotler, which, in essence, converted the trial into a "four-attorney prosecution of Cotler", since the co-defendants, as well as the Government, joined in attacking Cotler as the main culprit.

A. This situation was exacerbated by the fact that only Cotler omitted to take the witness stand, which fact was insidiously insinuated to the jurors, to the great detriment and prejudice of petitioner.

Contents

Page

B. Moreover, petitioner maintains there was a clear misjoinder of Cotler with the other defendants at trial. 5

II. The grand jury that indicted the petitioner herein comprised a quorum of twelve persons who did not attend all twenty-three sessions of that body. Accordingly, the grand jury which voted the indictment could not possibly have acted within the contemplation of Federal Rules of Criminal Procedure 6(f). 16

III. The failure to suppress evidence gathered as a result of court-authorized wiretaps and searches and seizures were error since the supporting affidavit failed to demonstrate the probable cause to conduct a search at the times and places requested. Moreover, the requirements of such cases as *Aguilar v. United States,* 378 U.S. 108, 12 L. Ed. 2d 723, and *Spinelli v. United States,* 393 U.S. 401, 21 L. Ed. 2d 637, were not honored. Finally, the five search warrants issued in reliance upon the Hersh affidavit were so overly broad as to constitute "general warrants". 21

IV. Once and for all, we ask this Court to resolve the dilemma which exists because of the decision in *United States v. White,* 401 U.S. 745, 28 L. Ed. 453, which was a plurality opinion of this Court, and which alone is relied upon by lower courts to authorize participant monitoring and taping of conversations without court order, upon the pretext that one of the participants to the conversation has consented thereto. 23

Conclusion 28

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Aguilar v. United States, 378 U.S. 108, 12 L. Ed. 2d 723 ..... i, 21

Alexander v. Louisiana, 405 U.S. 625, 31 L. Ed. 2d 536 20

Alexander v. United States, 138 U.S. 353 (1891) 19

Berger v. New York, 388 U.S. 41 26

Berger v. United States, 295 U.S. 78, 55 S. Ct. 679 15

Blair v. United States, 250 U.S. 273 (1919) 19

Blau v. United States, 340 U.S. 159 (1950) 19

Blau v. United States, 340 U.S. 332 (1951) 19

Costello v. United States, 350 U.S. 359 (1956) 18

Cross v. United States, 335 F. 2d 987 (D.C. Cir. 1964) 9

Davis v. Mississippi, 394 U.S. 721, 22 L. Ed. 2d 676 (1969) 22

De Luna v. United States, 308 F. 2d 140 (5th Cir. 1962) 9, 10

Contents

Page

Dennis v. United States, 384 U.S. 855 (1966) 19

Desist v. United States, 395 U.S. 244 (1969) 27

Duke v. United States, 301 U.S. 492 (1937)..... 20

Ex Parte Bain, 12 U.S. 1 (1887)..... 20

Gelbard v. United States, 408 U.S. 41 (1972) 19

Griffin v. California, 380 U.S. 609, 14 L. Ed. 2d 196 (1965)..... 11

Hale v. Henkel, 201 U.S. 43 (1906)..... 19

Hayes v. United States, 329 F. 2d 209 (8th Cir. 1964) ... 1[illegible]

Hoffa v. United States, 385 U.S. 293 (1966)..... 27

Hoffman v. United States, 341 U.S. 479 (1951) 19

Holmes v. Burr, 486 F. 2d 55 (9 Cir. 1973), cert. denied, 414 U.S. 1116 .....24, 25, 26, 27, 28

In re Dionisio, 442 F. 2d 276 (C.A. 7, 1971) 19

In re Grand Jury January, 1969, 315 F. Supp. 662 (D.C.D. Md. 1970)..... 19

In re Groban, 352 U.S. 330 (1957)..... 19

Katz v. United States, 389 U.S. 347 .....23, 24, 26, 27

Contents

Page

Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239 (1946) 13, 15

Lee v. Florida, 392 U.S. 378 (1968) 26

Lewis v. United States, 385 U.S. 206 (1966) 26

Linkletter v. Walker, 381 U.S. 618 24

Lopez v. United States, 373 U.S. 427 ..... 23, 26

Mara v. United States, 454 F. 2d 580 (C.A. 7, 1971) 19

Olmstead v. United States, 277 U.S. 438 ..... 24, 26, 27

On Lee v. United States, 343 U.S. 747 ..... 23, 26, 27

Osborn v. United States, 385 U.S. 323 26

Peters v. Kiff, 407 U.S. 493, 33 L. Ed. 2d 83 20

Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959) 19

Rathburn v. United States, 355 U.S. 107 (1957) 26

Rose v. Mitchell, 443 U.S. 545, 61 L. Ed. 2d 739 20

Schaffer v. United States, 326 U.S. 511, 4 L. Ed. 2d 921 (1960) 7

Schaffer v. United States, 362 U.S. 511, 80 S. Ct. 945 14

Contents

Page

Schwartz v. Texas, 344 U.S. 199 (1952) 26

Silverman v. United States, 365 U.S. 505 (1961)..... 26

Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) 19

Spinelli v. United States, 393 U.S. 401, 21 L. Ed. 2d 637 .....i, 21, 22

Stirone v. United States, 361 U.S. 212 (1960) 20

United States v. Abrahams, 466 F. Supp. 552 (D. Mass 1978) 7

United States v. Baldarrama, 566 F. 2d 560 (5 Cir. 1978), cert. denied, 437 U.S. 906, 98 S. Ct. 3094 13

United States v. Crawford, 581 F. 2d 489 (5th Cir. 1978) 7, 9

United States v. Elliott, 571 F. 2d 880 (5 Cir.), cert. denied, 439 U.S. 953 (1978) 12, 13, 14

United States v. Harbin, 601 F. 2d 773 (5th Cir. 1979) 10

United States v. Johnson, 478 F. 2d 1129 (5th Cir. 1973) 7

United States v. Lane, 584 F. 2d 60 (5 Cir. 1978) 14

Contents

Page

United States v. Scully, 225 F. 2d 113 (C.A. 2), cert. denied, 350 U.S. 897 (1955) 19

United States v. Staller, 616 F. 2d 1284 (5th Cir. 1980) 10

United States v. Valdes, 262 F. Supp. 474 (D.P.R. 1967) 7, 9

United States v. White, 401 U.S. 745, 28 L. Ed. 2d 453 .....i, 23, 24, 26, 27

Wong Sun v. United States, 371 U.S. 471, 9 L. Ed. 2d 441 (1963)..... 22

Statutes Cited:

18 U.S.C. §333 19

18 U.S.C. §1961 2

18 U.S.C. §1962 2

18 U.S.C. §1962(c) 1, 2

18 U.S.C. §1962(d) 1

18 U.S.C. §2515 19

28 U.S.C. §186(b)..... 11

28 U.S.C. §1254 2

Contents

Page

28 U.S.C. §1257 2

28 U.S.C. §§1861-1868 20

47 U.S.C. §605 26

United States Constitution Cited:

Fourth Amendment 19, 23, 24, 25, 27, 28

Fifth Amendment 10, 16, 17, 20

Rules Cited:

Federal Rules of Criminal Procedure:

Rule 6(f) 16

Rule 8(b) .....i, 11, 13, 14

Rule 14 .....6, 9

Rule 41 22

Other Authorities Cited:

8 Moore's Federal Practice (1981) pp. 8.04(2), 8.06(4) ..13, 14

8 Moore's Federal Practice §14.04(3) 11

C. Bradley, Racketeers, Congress, and the Courts: An Analysis of RICO, 65 Iowa L. Rev. 837 (1980) 14

Contents

Page

Morse, A Survey of the Grand Jury System, 10 Ore. L. Rev. 101 (1931) 18

B. Schwartz, The Bill of Rights: A Documentary History (New York: 1971) 18

Walsh, Fair Trials and the Federal Rules of Criminal Procedure, 1963, 49 A.B.A.J. 853 6

Joinder of Defendants in Criminal Prosecutions, 1967, 42 N.Y.U.L. Rev. 513 6

Report of the January 1970 Grand Jury (Black Panther Shooting) U.S.D.C.N.D. Ill. released May 15, 1970 .. 19

APPENDIX

Order of Affirmance 1a

Order of the United States Court of Appeals for the Third Circuit on Sur Petition For Rehearing 3a

Opinion of the United States Court of Appeals for the Third Circuit 4a

Relevant Constitutional and Statutory Provisions 23a

No.

In The

Supreme Court of the United States

October Term, 1982

IRVING COTLER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINION BELOW

A copy of the opinion of the United States Court of Appeals for the Third Circuit is annexed hereto as an appendix.

JURISDICTION

(a) The judgment of conviction was rendered July 17, 1981 convicting the petitioner of a two-count "RICO" indictment [18 U.S.C. §§1962(c) and (d)].

Of the four defendants on trial, two were acquitted, and two were convicted, namely the petitioner herein and Nunzio Provenzano.

The defendants, as well as the petitioner herein, were indicted for violations of 18 U.S.C. §1962(c), as well as a conspiracy in connection therewith.

The charges allegedly rose out of the defendants' activities in obtaining illegal payments from four trucking companies in order to secure labor peace. The prosecution was under the so-called "RICO" statute.

(b) The order and judgment of affirmance of the United States Court of Appeals for the Third Circuit was dated September 1, 1982. A copy of an opinion rendered in connection therewith is annexed as an appendix hereto.

A petition for rehearing was filed, but on September 27, 1982, the court denied the rehearing. A copy of the order denying the "*sur* petition for rehearing" is annexed hereto as part of the appendix.

(c) Jurisdiction to review the judgment in question by certiorari is conferred under 28 U.S.C. §§1254 and 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth, Fifth and Sixth Amendments of the United States Constitution, as well as the so-called "RICO" statute, 18 U.S.C. §1962, are involved. In addition, 18 U.S.C. §1961 is involved as well.[1]

STATEMENT OF THE CASE

Irving Cotler, the petitioner herein, was the owner of several trucking companies which had no contracts with Local 560 of the Teamsters Union, with which co-defendant Nunzio Provenzano was affiliated.

---

1. Copies of the pertinent portions of the aforesaid statutes, because of their length, will be annexed as part of the appendix.

Nunzio Provenzano served in various capacities in the Teamsters Union Local 560 in Northern New Jersey, progressing from business agent to secretary-treasurer, and ultimately to president in 1975.

During the period covered by the indictment, the labor contract between Local 560 and signatory companies contained a "city man rule". Supposedly, this provision mandated that trucking companies hauling iron, steel, and special commodities within the jurisdiction of Local 560 were required to secure express authorization for its operations from the union. Without such approval, a company would be required to utilize the services of a Local 560 "city man" during pickup and delivery.

One Ray Dee acted as the North Jersey agent for All States Trucking Company.

In 1972, following Provenzano becoming the union's business agent, the permanent "city man" assigned to All States Trucking Company was discharged, and shortly after this Dee began making payments to petitioner Cotler. These payments, supposedly, were to permit All States to operate without the use of a "city man".

The Court of Appeals found that in 1975 All States expanded its operation and began using an additional agent named Joe Mabus. He made payments to Provenzano through another intermediary until he was imprisoned in early 1975. Following that, Mabus made no further payments and a few months later Local 560 struck All States Trucking Company.

The strike concluded when All States' president discharged Mabus and agreed to use "city men". The Ray Dee Agency's transactions, however, were not affected by the strike.

About a year later, All States' vice-president met with Provenzano in a preliminary step to reopen an iron and steel agency in Local 560's area.

Ultimately the Government introduced evidence that a meeting took place between the vice-president and petitioner Cotler, which was arranged through Ray Dee, Jr.

Supposedly, at this meeting, Cotler said All States would not need a "city man" for any of its shipments. Cotler allegedly then brought the vice-president to Local 560's offices, where they conferred with Nunzio Provenzano, who stated that Cotler was a "good friend" and advised the vice-president to "listen to what he's telling you".

For the next three years, All States arranged to have Ray Dee, Jr. pay Cotler $100 per day, in addition to Dee's own payments to protect his agency.

In 1975, another trucking company, T.I.M.E.-D.C., began special commodity operations in North Jersey, and hired Joe Szapor as its agent. Through Teamster contacts, Szapor had a meeting with Provenzano and three other men. The agent was assured he would be contacted, and some time later Szapor was introduced to Cotler.

Cotler said he would be collecting for Local 560, and supposedly told Szapor not to travel to the union itself.

During the next year, Cotler was given $500 per month and T.I.M.E. was able to avoid using "city men".

T.I.M.E.'s business began to prosper and Cotler allegedly said that monthly payments should be increased.

To this, T.I.M.E. acquiesced, but a number of grievances with Local 560 developed. Szapor protested to Provenzano about these problems since T.I.M.E. was making its regular payments.

Provenzano told Szapor to resolve the grievances at the terminal level. When Szapor then spoke to Local 560's business agent, the grievances were in fact settled.

Similar arrangements were negotiated with two other trucking companies between 1977 and 1979, namely Helms Express and Mason and Dixon Corp., which supposedly paid Cotler through the Szapor and Ray Dee Agencies, respectively.

Mason and Dixon paid a fixed weekly fee, but Helms was required to remit a percentage of its revenues.

The jury, as we have indicated, convicted Cotler and Provenzano on both counts of the indictment.

REASONS FOR GRANTING THE WRIT

I.

Petitioner was extremely prejudiced by the refusal of the trial court to grant his motions made pre-trial and during trial, for a severance. The trial judge was well aware that the defenses of the three co-defendants of petitioner at trial were strongly antagonistic to that of Cotler, which, in essence, converted the trial into a "four-attorney prosecution of Cotler", since the co-defendants, as well as the Government, joined in attacking Cotler as the main culprit.

(A) This situation was exacerbated by the fact that only Cotler omitted to take the witness stand, which fact was insidiously insinuated to the jurors, to the great detriment and prejudice of petitioner.

(B) Moreover, petitioner maintains there was a clear misjoinder of Cotler with the other defendants at trial.

In the case at bar there is no dispute about the fact that petitioner moved at both pre-trial and during trial, for severances. Early on it became obvious that there was extreme antagonism among the four defendants at trial with respect to Cotler. Three of the four defendants let it be known that their strategies would unmistakably direct evidence of guilt at Cotler, to the exclusion of their respective claims.

There was harmony in the defense of the three co-defendants of Cotler, but not vis-a-vis himself.

A perusal of the record reveals unmistakably, that for all intents and purposes, Cotler was being prosecuted by four lawyers,

namely the attorneys for the three co-defendants on trial with him, and the prosecuting attorney.

Federal Rule of Criminal Procedure 14 (hereinafter F. R. Cr. P. 14) is controlling with respect to relief from prejudicial joinder of defendants.

Joinder of offenses against a single defendant may or may not be prejudicial. Joinder of defendants is very frequently prejudicial. The seeming reluctance, however, of the courts to enforce F. R. Cr. P. 14 and grant relief from such prejudice has been sharply criticized:

> "A third serious problem arising from the existing Federal Criminal Rules centers on *Rule 14*, which is entitled 'Relief from Prejudicial Joinder', *but might as well be entitled 'No Relief from Prejudicial Joinder'* as now construed . . .
>
> The only justification for the mass trials that Rule 14 encourages is that the cheapest, easiest way to send a large group of people to jail is to dispatch them at the same time. The mass transportation permitted by Rule 14 explains why the expression 'railroading a man to jail' has come to signify unfairness and injustice." (Walsh, *Fair Trials and the Federal Rules of Criminal Procedure*, 1963, 49 A.B.A.J. 853, 856-857).

In addition, criticism of the enforcement or, rather, non-enforcement of the rule, appeared in a note, *Joinder of Defendants in Criminal Prosecutions*, 1967, 42 N.Y.U.L. Rev. 513, 535:

> "The current manner in which most trial courts administer Federal Rule 14, however, is not consonant either with the purpose of that rule or with the rules in general."

It is also not disputed that a trial judge has a continuing duty to grant a severance if prejudice appears in the light of later

developments during the trial. [*Schaffer v. United States*, 326 U.S. 511, 4 L. Ed. 2d 921 (1960)].

Thus, it is obvious that a motion for severance might be properly denied at an early part of a trial, nevertheless may be required by events as they develop during the trial.

Counsel for Mr. Cotler, during both his pre-trial motion for severance (A130-133) and his renewed motions throughout the course of the trial, placed great emphasis upon the existence of "antagonistic" defenses between his client and the other defendants as grounds for severance. Several courts have granted or recognized the need for severance when such a conflict between defenses is posed. *See, e.g., United States v. Crawford*, 581 F. 2d 489 (5th Cir. 1978); *United States v. Johnson*, 478 F. 2d 1129 (5th Cir. 1973); *United States v. Abrahams*, 466 F. Supp. 552 (D. Mass. 1978); *United States v. Valdes*, 262 F. Supp. 474 (D.P.R. 1967).

An inseparable adjunct to petitioner's argument on the practical effect of antagonistic defenses is the multiple adversaries the criminal defendant in such a situation is compelled to face (A131). That effect was noted with particularity in each of the four cases cited immediately above (*Johnson, Crawford, Abrahams* and *Valdes*) but perhaps best articulated in the language of the court in *Crawford*:

> "Each was the government's best witness against the other. Each defendant had to confront not only hostile witnesses presented by the government, but also hostile witnesses prsented by his co-defendant. Witnesses against each defendant were thus examined by one adversary and cross-examined by another adversary. A fair trial was impossible under these inherently prejudicial conditions." 581 F. 2d *supra* at 492.

In denying Mr. Cotler's pre-trial motion for severance (without prejudice and with leave to renew same at a later time, A134), the trial judge specified that what troubled him most was that the motion might be premature (A132). He went on to note

that Mr. Cotler's argument, though meritorious, was based essentially upon suppositions and possibilities as to relative defenses by the co-defendants (A132-133). However, it did not take the various co-defendants long to make their respective positions with respect to Irving Cotler quite clear.

In their opening statements, all three counsel for the co-defendants at trial emphasized repeatedly the hostility between Cotler on the one hand, and their respective clients on the other. This was repeated throughout the case, and especially in summations. Each branded Cotler as the culprit.

So virulent and vehement were the denunciations of Cotler by counsel for the co-defendants, that in all respects it can be clearly demonstrated that for all intents and purposes Cotler was being "prosecuted" by the three co-defendants and the Government.

The trial court, while denying motions for severance which were repeated time and again, ruled that the denials were without prejudice.

When in summations the attorneys for the co-defendants unmistakably insinuated that Cotler had not taken the witness stand and, therefore, could not be cross-examined, the prejudice was exacerbated to the point of precluding the possibility of a fair trial. In our brief in the court below elaborate treatment of this issue was given, but space in the petition for certiorari precludes the type of discourse and analysis which this point deserves (A145-147, 150, 157-158, 178-183, 185-187, 251-254, 266-274, 293-296, 301-305, PA67-72[2]).

For the court below to have stated that the defenses were really "harmonious" instead of antagonistic is incredible, since the record reveals the complete contrary. We urge this Court to

---

2. The prefix "A" refers to petitioner Cotler's appendix in the court below; the prefix "PA" refers to co-appellant Nunzio Provenzano's appendix in the Court of Appeals. The suffix "a" refers to petitioner Cotter's appendix to this Court, *infra*.

review the appendices and other material in this case, since it is submitted that with all due respect to the Third Circuit, it could not possibly have appreciated the gross unfairness that the denial of a severance created in the case at bar, so far as petitioner Cotler is concerned.

Faced with four adversaries instead of one, his defense posture was different than it might have been and the personal ridicule and acrimony injected against him by his co-defendants only seemed to heighten the aura of isolation with which he was surrounded in the eyes of the jurors. Indeed, "[a] fair trial was impossible under these inherently prejudicial conditions." *Crawford,* 581 F. 2d *supra* at 492. *See Valdes,* 262 F. Supp. *supra.*

In considering a motion for severance, it is entirely proper for the court to weigh the conflicting forces operating upon the defendant's choice of whether to testify in his own defense or not. *See, e.g., Cross v. United States,* 335 F. 2d 987 (D.C. Cir. 1964). As will be shown, powerful forces were at work in this matter — forces calculated to compel Irving Cotler to either take the stand or to exact a terrible price if he did not.

In *Cross v. United States,* 335 F. 2d 987 (D.C. Cir. 1964), the court found prejudicial joinder of offenses which served to compel a defendant to testify concerning a count upon which he had wished to remain silent. Judge Bazelon's opinion forcefully reflected his concern that prejudice is virtually inevitable whenever joinder "embarrasses or confounds an accused in making his defense." *Id.* at 989. While the joinder of offenses may be procedurally distinct from the joinder of defendants, F. R. Crim. P. 14 appears to encompass both and the spirit of judicial efforts at minimizing the impact of improper pressures upon the defendant's choice to remain silent should be applicable to both. *Cross,* 355 F. 2d *supra* at 989.

Most commentators agree that the seminal case dealing with the propriety of a defense attorney whose client takes the stand commenting or alluding to a co-defendant's failure to do so is *DeLuna v. United States,* 308 F. 2d 140 (5th Cir. 1962). In *DeLuna,* the court held that comments from a co-defendant's attorney emphasizing the silence of the other defendants while his own

client was willing to testify were prejudicial and warranted a new trial. *Id.* at 141.

There can be no question but that the problem of one defendant commenting upon a fellow defendant's failure to take the stand is a "substantial and troublesome one." *Hayes v. United States*, 329 F. 2d 209, 221 (8th Cir. 1964). It is doubly-so when those "comments" are indirect, subtle and even unspoken yet devastatingly lethal to a defendant's absolute right to remain silent and not suffer for the exercise of that right. Courts have recognized violations of Fifth Amendment rights notwithstanding the absence of direct comments or bad faith. *See, e.g., United States v. Harbin*, 601 F. 2d 773 (5th Cir. 1979) (oblique comments, if sufficiently suggestive, tantamount to direct comment); *United States v. Staller*, 616 F [illegible] 1284 (5th Cir. 1980) (no matter that comment by Government witness not anticipated).

There can be no overemphasizing the important effect upon the jury created by the fact that Nunzio Provenzano, Salvatore Provenzano and Michael Sciarra all testified in their own defense. Irving Cotler alone did not. Of course, all defendants were exercising their respective and absolute rights in so doing. But the prejudice and danger of the jurors drawing an improper conclusion was inevitable. The only conceivable cure for this situation was severance. Notably, the trial judge denied Mr. Cotler's pre-trial motion for severance upon the basis that it was speculative and that defense counsel was only "anticipating things that may happen" (A132-133). Once the last of his three co-defendants took the stand and it was clear that Mr. Cotler would not, that alone might have justified the court in ordering a severance. At that point, the statistical likelihood of prejudice to Irving Cotler in the minds of the jury had become an incurable probability.

Yet the defense strategies of Mr. Cotler's three co-defendants went beyond merely assuming the witness stand and thus emphasizing his failure to do so. The obvious attempts to disavow any relationship with Irving Cotler and the personal, often vitriolic comments about him have been recounted above. These merely set the stage for affirmative — albeit subtle — comments concerning Mr. Cotler's silence in the courtroom. By the time

the jurors began their deliberations these comments, spoken and unspoken, filled the very air the jurors breathed. As noted by several jurisdictions and at least one legal commentator:

> "A problem somewhat similar to *de Luna* arises when one defendant seeks to extricate himself at another's expense, not by testifying against his co-defendant, but by conducting his defense in a manner calculated to prejudice the jury against his co-defendant.
>
> This may be attempted in the cross-examination of witnesses, in opening and closing statements, and in a number of subtle and extra-legal ways." 8 Moore's Federal Practice §14.04(3) *and cases therein.*

Few rules of trial practice are as immediate and decisive as that which forbids comment by the prosecutor upon a defendant's failure to testify. *Griffin v. California,* 380 U.S. 609, 14 L. Ed. 2d 196 (1965). It is respectfully submitted that under the circumstances peculiar to the instant matter the policy meant to be served by that rule was utterly emasculated. The comments made by defense counsel here, whether direct or indirect and regardless of their source, were at the expense of Irving Cotler's absolute right to remain silent and not suffer for the exercise of that right.

In the end, the tragedy that was played out on that stage was totally at variance with Irving Cotler's fundamental right to a fair trial and was abhorrent to our most basic precepts of due process.

The record below demonstrates clear "Misjoinder" within the meaning of Federal Rule of Criminal Procedure 8(b). The offenses claimed as constituting the racketeering activity were a series of violations of 29 U.S.C. §186(b) committed at various times between 1971 and 1980. These alleged violations consisted of taking money from employers to influence officers of the union with respect to their actions as representatives of the employees.

Only Cotler was not a member of this union. He was the operator of a trucking firm.

The indictment alleged a conspiracy to extort money from other trucking companies in exchange for overlooking the failure of these companies to comply with an onerous obligation of the collective bargaining agreement requiring the trucking companies to employ the services of a "city man" when special commodities were shipped into or out of the area of Local 560's jurisdiction. (PA67-72).

The alleged conspiracy centers around the three defendants who were officers of Local 560, to collect and extort money from certain truckers in connection with the so-called "city-man" provision of the collective bargaining agreement. Petitioner Cotler was engaged in this single conspiracy on the grounds that he "unlawfully did aid, abet, counsel, induce, procure, and willfully cause the commission of the said offenses".

Acutely antagonistic defenses of the three defendants, who were union officials, in contradiction to Cotler who was not affiliated with the union at all, we maintain that there were at least two, and possibly more, conspiracies established by the evidence. We are not conceding that any violation of law was proved so far as Cotler is concerned, under the terms of this indictment, but arguendo we maintain that if proved, at least two or more had to be established.

The Government was obligated to establish an actual agreement to commit a substantive "RICO" offense. "To be convicted as a member of an enterprise conspiracy, an individual, by his words or actions, must have *objectively manifested* an agreement to participate directly or indirectly, in the affairs of an enterprise through the commission of two or more predicate crimes." [*See United States v. Elliott*, 571 F. 2d 880 at 903 (5 Cir.), *cert. denied*, 439 U.S. 953, 99 S. Ct. 349 (1978)].

It is now well-settled that a material variance between the indictment and the Government's evidence is created by the Government's proof of multiple conspiracies under an indictment alleging a single conspiracy.

This multiple conspiracy doctrine is commonly illustrated by the Supreme Court's decision in *Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239 (1946). The indictment in *Kotteakos* alleged a single conspiracy to obtain Government loans by making fraudulent representations, but the Government's proof at trial, by its own admission, demonstrated eight separate conspiracies. The common element in those conspiracies consisted solely of one man who had directed each group; aside from this single defendant, there was no connection among the various agreements.

As the Supreme Court aptly described these multiple conspiracies, the pattern established by the Government there consisted of "separate spokes meeting in a common center" but "without the rim of the wheel to enclose the spokes". (328 U.S. at 755, 66 S. Ct. at 1243).

Similarly, in the case at bar, there is no connection in the single conspiracy allegedly involving the three members of the union with that of the petitioner herein.

The Supreme Court in *Kotteakos* held that such proof created a material variance with an indictment charging a single conspiracy and, as such, was reversible error. *See also, United States v. Elliott, supra*, 571 F. 2d at 900. *See*, too, *United States v. Baldarrama*, 566 F. 2d 560, 565-66 (5 Cir. 1978), *cert. denied*, 437 U.S. 906, 98 S. Ct. 3094.

It is therefore urged that a variance between a single conspiracy indictment and evidence of multiple conspiracy should be treated not as a "variance" problem at all, but rather as a "misjoinder" question under Federal Rule of Criminal Procedure 8(b). [*See* J. Moore, 8 Moore's Federal Practice, p. 8.06(4) (1981)].

Rule 8(b) — which was enacted after the Supreme Court's decision in *Kotteakos* — is aimed at precisely the problem faced in that case: the transference of guilt among defendants who should not have been joined together in a single trial. The treatment of the multiple conspiracy doctrine as a variance issue despite the subsequent development of Rule 8(b), arguably creates a serious anomaly in the law. If the Government indicts several defendants under a single conspiracy count and yet proves multiple

conspiracies at trial, a material variance results and the defendants are each entitled to a new trial if they can show that their substantial rights were affected by the variance. (*See, e.g., United States v. Elliott, supra,* at 900). If, however, the Government indicts several defendants in an indictment that alleges what amounts to multiple conspiracies, and the District Court nevertheless refuses to sever the trial, the defendants are each entitled to a new trial *without any showing of prejudice,* for misjoinder under Rule 8(b) is *inherently prejudicial. [See, e.g., United States v. Lane,* 584 F. 2d 60, 62 (5 Cir. 1978); J. Moore, *supra,* at p. 8.04(2)$_1$.

The end result of the separate development of these two lines of authority — one under variance doctrine and the other under Rule 8(b) — means that the trial of multiple conspiracies is treated differently on appeal depending on whether the Government fails to introduce evidence of a single conspiracy at trial (*i.e.,* a variance requiring reversal if substantial rights are affected) or instead fails in the indictment to allege facts sufficient to constitute a single conspiracy [*i.e.,* a misjoinder under Rule 8(b), requiring reversal in all cases irrespective of prejudice].

As difficult as this anomaly may be to justify, it is submitted that *Schaffer v. United States,* 362 U.S. 511, 80 S. Ct. 945, ruled that the propriety of joinder under Rule 8(b) is to be judged according to the language of the indictment, not according to the Government's proof at trial. Thus, so long as the indictment alleges facts that amount to a single conspiracy, it matters not — as far as Rule 8(b) is concerned — that the Government fails to introduce at trial proof of a single conspiracy.

Read out of context, without attention to the facts of the case or to the court's rationale, *United States v. Elliott, supra,* would seem to support the Government's position, *i.e.,* that the defendants' participation in the same "RICO" enterprise is enough to tie otherwise multiple conspiracies together even where, as here, there is no agreement of any kind between the members of the two separate conspiracies. *See* C. Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO,* 65 Iowa L. Rev. 837, 876-79 (1980).

Assuming *arguendo* that a variance existed, although we believe that there is strong evidence that misjoinder is established, we must consider two seminal cases on the question, namely *Berger v. United States,* 295 U.S. 78, 55 S. Ct. 679 and *Kotteakos v. United States, supra.*

Berger announced the rule that such a variance is fatal only if it has affected the substantial rights of the accused, 295 U.S. at 81-82, and went on to find no such effect on the facts of that case.

The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense. (295 U.S. at 82).

In *Kotteakos,* by contrast, the Court did find that the defendants had been sufficiently prejudiced to justify reversal.

When the Government tries multiple conspiracies under a single count, an important right is at stake in addition to those cited in *Berger:*

> "The right not to be tried en masse for the conglomeration of distinct and separate offenses committed by others. (Kotteakos, 328 U.S. at 775)."

It must be noted that prejudice inhered in the *Kotteakos* trial *not* because of the number of defendants or conspiracies per se, but because of the "dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise . . ." (328 U.S. at 774, 66 S. Ct. at 1252).

Since the defenses and the procedures in this case revealed a violent attack against petitioner Cotler by the three other defendants in the case, coupled with all the factors we have already adverted to, it is obvious that transference of guilt not only

occurred, but was fostered by dint of the defenses of the other three defendants in the case.

The sharply contradictory defenses and the allegations of guilt hurled at Cotler by the other three defendants, to say nothing of the Government, is still another reason why a severance should have occurred because it precluded a fair trial altogether. (*See* Fifth Amendment, United States Constitution — Due Process Clause).

Thus, we see that in the case at bar there was at least a variance in the presentation of the case and we urge that there was a clear misjoinder. In any event, because of the antagonistic and contradictory positions of the three defendants as against Cotler, there was no possibility of a fair trial for Cotler and, in essence, he had four prosecutors conducting a case against him. On this latter basis as well, therefore, we maintain that he should have been severed. Certiorari should be granted.

II.

The grand jury that indicted the petitioner herein comprised a quorum of twelve persons who did not attend all twenty-three sessions of that body. Accordingly, the grand jury which voted the indictment could not possibly have acted within the contemplation of Federal Rules of Criminal Procedure 6(f).

The court below quite frankly concedes that a "difficult question is presented" by the complaint against the grand jury because "not all who voted for the indictment had attended all twenty-three sessions." (Slip opinion, p. 14a). It was found by the Court of Appeals that of the twelve votes mandated under F. R. Cr. P. 6(f) "three of the voting jurors attended every session, four missed one session each, three were absent from two sessions each and two jurors were not present three sessions each."

The court below was sufficiently concerned about what had occurred to make a direction that where grand jurors miss sessions that they be provided with the minutes of the session which they missed so as to familiarize themselves with what occurred (*id.* pp. 14a, 15a). But this was *not* done herein.

The trial court would not unseal the records of the grand jury so it is even as of this date impossible to tell what important matters may have occurred when a mandatory minimum quorum was not available.

If a trial juror missed any session, obviously there would have to be a mistrial.

While it is true that a grand jury cannot convict in the sense that a petit jury can, it is equally obvious that the finding of an indictment very often is virtually as devastating as a conviction, particularly in the case of a person such as petitioner Cotler, who runs a large trucking organization and whose reputation and business are seriously affected by any adverse publicity.

The court below apparently was of the opinion that error occurred when a minimum quorum of twelve grand jurors were clearly not present at each of the twenty-three sessions of the grand jury.

It must be presumed that each session was of some importance, and we are not given information as to the length of the respective sessions. For example, there were four defendants who ended up being indicted by the grand jury, which includes Cotler.

It may very well be that the session which was missed was perhaps the most crucial involving Cotler.

Moreover, the opinion of the court below, which notes that only three of the voting jurors attended every session, necessarily implies that there may very well have been nine jurors absent from the quorum of twelve needed to indict at a time when the most crucial evidence involving Cotler was presented.

We respectfully submit that this Court should address itself to the dilemma thus posed, which we believe is of constitutional dimension, because the Fifth Amendment clearly declares that "No person shall be held to answer for a capital, or otherwise infamous crime, unless upon presentment or indictment of a Grand Jury. . ."

The history of the grand jury is rooted in the common and civil law, extending back to Athens, pre-Norman England, and the Assize of Claredon promulgated by Henry II.[3] The right seems to have been first mentioned in the colonies in the Charter of Liberties and Privileges of 1683, which was passed by the first assembly permitted to be elected in the colony of New York.[4] Included from the first in Madison's introduced draft of the Bill of Rights, the provision elicited no recorded debate and no opposition. "The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. Grand jurors were selected from the body of the people and their work was not hampered by rigid procedural or evidential rules. In fact, grand jurors could act on their own knowledge and were free to make their presentments or indictments on such information as they deemed satisfactory. Despite its broad power to institute criminal proceedings the grand jury grew in popular favor with the years. It acquired an independence in England free from control by the Crown or judges. Its adoption in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice. And in this country as in England of old the grand jury has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor."[5]

The prescribed constitutional function of grand juries in federal courts is to return criminal indictments, but the juries serve

---

3. Morse, *A Survey of the Grand Jury System,* 10 Ore. L. Rev. 101 (1931).

4. B. Schwartz, *The Bill of Rights: A Documentary History* (New York: 1971), 162, 166. The provision read: "That in all Cases Capitall or Criminall there shall be a grand Inquest who shall first present the offence. . . ."

5. *Costello v. United States,* 350 U.S. 359, 362 (1956).

a considerably broader series of purposes as well. Principal among these is the investigative function, which is served through the fact that grand juries may summon witnesses by process and compel testimony and the production of evidence generally. Operating in secret, under the direction but not control of a prosecutor, unbound by a number of evidentiary and constitutional restrictions, such juries may examine witnesses in the absence of their counsel and without informing them of the object of the investigation or the place of the witnesses in it.[6] Besides indictments, grand juries may issue as well reports which may indicate nonindictable misbehavior, mis- or malfeasance of public officers, or other objectionable conduct.[7] Despite the vast power of grand juries, there is little in the way of judicial or legislative

---

6. *Cf. United States v. Scully*, 225 F. 2d 113, 116 (C.A. 2), *cert. denied*, 350 U.S. 897 (1955). The privilege against self-incrimination must be observed by the grand jury, *Blau v. United States*, 340 U.S. 159 (1950); *Hoffman v. United States*, 341 U.S. 479 (1951), as well apparently as the Fourth Amendment protection against unreasonable searches and seizures, *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); *Hale v. Henkel*, 201 U.S. 43, 76-77 (1906); *cf. In re Dionisio*, 442 F. 2d 276 (C.A. 7, 1971), and *Mara v. United States*, 454 F. 2d 580 (C.A. 7, 1971) (Fourth Amendment limitations on compelled production of voice exemplars and handwriting samples). Additionally, the husband-wife privilege, *Blau v. United States*, 340 U.S. 332 (1951), and the attorney-client privilege, *Alexander v. United States*, 138 U.S. 353 (1891), may be asserted before a grand jury. The Court has interpreted a provision of federal wiretap law, 18 U.S.C. §2515, to prohibit utilization of unlawful wiretap information as a basis for questioning witnesses before grand juries. *Gelbard v. United States*, 408 U.S. 41 (1972). The traditional secrecy of grand jury proceedings has been relaxed a degree to permit a limited discovery of testimony. *Compare Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959), *with Dennis v. United States*, 384 U.S. 855 (1966). There is no constitutional right to counsel before grand juries, *In re Groban*, 352 U.S. 330, 333 (1957).

7. The grand jury "is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime." *Blair v. United States*, 250 U.S. 273, 281 (1919). On the report's function of the grand jury, *see In re Grand Jury January, 1969*, 315 F. Supp. 662 (D.C.D. Md. 1970), and *Report of the January 1970 Grand Jury* (Black Panther shooting), U.S.D.C.N.D. Ill., released May 15, 1970. Congress has now specifically authorized issuance of reports in cases concerning public officers and organized crime. 18 U.S.C. §333.

response designed to impose some supervisory restrictions on them.[8]

Since a person can be tried only upon the indictment as found by a grand jury, and only upon its language found in the charging part of the instrument, the importance of the grand jury is readily recognized. [*Duke v. United States,* 301 U.S. 492 (1937); *Stirone v. United States,* 361 U.S. 212 (1960); and, *Ex Parte Bain,* 121 U.S. 1, 12 (1887)].

We therefore submit that any irregularity or defect, as we perceive herein, is a serious matter of constitutional dimension. For example, in *Peters v. Kiff,* 407 U.S. 493, 33 L. Ed. 2d 83, this Court held that where certain persons, such as negroes, were systematically excluded from the grand jury and petit jury, due process was denied. Where a grand jury was not properly selected, the defendant's constitutional rights were denied (*Alexander v. Louisiana,* 405 U.S. 625, 31 L. Ed. 2d 536).

Finally, in *Rose v. Mitchell,* 443 U.S. 545, 61 L. Ed. 2d 739, this Court held that federal habeas corpus courts may consider a claim of racial discrimination in a grand jury, even if no taint or error at trial resulted in a conviction.

What the foregoing cases and others clearly indicate is that scrupulous fairness must be accorded in the grand jury proceedings, and the absence of three-quarters of a mandatory minimum quorum, on its face, appears to be clearly violative of the Fifth Amendment and of the entire concept of grand jury proceedings.

Moreover, we do not know whether or not the persons who were absent were of the same race or religious persuasion as the defendant, which could add certain other complications.

---

8. Congress has required that in the selection of federal grand juries, as well as petit juries, random selection of a fair cross section of the community is to take place and has provided a procedure for challenging discriminatory selection by moving to dismiss the indictment. 28 U.S.C. §§1861-1868.

Finally, we do not know what occurred at the respective sessions when the grand jurors were absent, because the courts below have refused to unseal the grand jury minutes.

III.

The failure to suppress evidence gathered as a result of court-authorized wiretaps and searches and seizures were error since the supporting affidavit failed to demonstrate the probable cause to conduct a search at the times and places requested. Moreover, the requirements of such cases as *Aguilar v. United States*, 378 U.S. 108, 12 L. Ed. 2d 723, and *Spinelli v. United States*, 393 U.S. 401, 21 L. Ed. 2d 637, were not honored. Finally, the five search warrants issued in reliance upon the Hersh affidavit were so overly broad as to constitute "general warrants".

The five searches conducted herein with respect to petitioner Cotler rested upon affidavits of Agent John Hersh dated April 3 and April 17, 1979. Petitioner submits that these affidavits were constitutionally deficient because substantial portions thereof were totally irrelevant in terms of time and place and for the purpose of demonstrating probable cause.

The touchstone for judging the sufficiency of the hearsay portions of Hersh's affidavits is *Aguilar v. United States*, 378 U.S. 108, 12 L. Ed. 2d 723 (1964). In *Aguilar* the Supreme Court promulgated a "two-pronged" test by which to judge the sufficiency of affidavits based upon information provided by informants. First, the underlying circumstances of the informant's knowledge must be demonstrated in order to ensure that it is not based on mere rumor, speculation, underlying hearsay or even fabrication. Secondly, the affiant must have some basis to believe that the informant is credible and his information reliable. *Id.* at 114-115, 12 L. Ed. 2d 723, 729.

Hersh related information purportedly supplied by several informers, three of whom were former officers in Vornado, Inc. (A26-28). The affiant did not even make a minimum effort to vouch for the credibility of Joseph Brady, Daniel Sorrell and Sol Rogoff. Consequently, the information supplied by these

individuals patently failed the second "test" of *Aguilar* and should have been treated accordingly by the reviewing judicial officer.

Furthermore, the Hersh affidavits referring to information from two principal informers, namely Ralph Picardo and Joseph Szapor, indicate virtually no specific allegations of reliability were ever set forth by Hersh, but merely general, vague, conclusory statements were made.

Nor were the affidavits salvaged by sufficient corroborative information because the reliability of the informants was woefully lacking (*Spinelli v. United States,* 393 U.S. 401, 21 L. Ed. 2d 637).

Irving Cotler submits that neither the hearsay nor the direct investigative averments set forth in the Hersh affidavits, whether taken separately or together, established the probable cause necessary to sustain the validity of the wiretap order or the five search warrants issued in reliance thereon. Absent sufficient probable cause to sustain the issuance of those warrants, all evidence seized pursuant thereto should have been suppressed. *See, e.g., Davis v. Mississippi,* 394 U.S. 721, 22 L. Ed. 2d 676 (1969). F.R. Crim. P. 41.

In addition, to the extent that Hersh's April 17th affidavit relied in part (A53) upon the fruits of wire interceptions authorized by the April 3rd order (A46), they are "tainted" and should be disregarded in the court's analysis of the second affidavit. *Wong Sun v. United States,* 371 U.S. 471, 9 L. Ed. 2d 441 (1963).

With respect to the five search warrants that were issued, we maintain they were so overly broad as to constitute what amounted to a "general search". The search warrants, in essence, authorized precisely what Hersh requested, virtually without qualification.

The language of the five search warrants sets virtually no parameters on the areas to be searched or the items to be seized. This is especially true of those warrants relating to Irving Cotler's residence and office. They authorized nothing less than an exploratory search.

> "To condone what happened here is to invite a government official to use a seemingly precise and legal warrant to get into a man's home, and, once inside, to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant. Stanley v. Georgia, 394 U.S. supra at 572, 22 L. Ed. 2d 542, 553 (JJ Stewart, Brennan and White, concurring)."

As general warrants they were invalid and the fruits of the searches conducted pursuant to them should have been suppressed.

IV.

Once and for all, we ask this Court to resolve the dilemma which exists because of the decision in *United States v. White*, 401 U.S. 745, 28 L. Ed. 2d 453, which was a plurality opinion of this Court, and which alone is relied upon by lower courts to authorize participant monitoring and taping of conversations without court order, upon the pretext that one of the participants to the conversation has consented thereto.

Since the opinion of this Court by a 4 to 4 split, in *United States v. White*, 401 U.S. 745, lower courts and agents throughout the country have assumed that they are authorized to employ electronic surveillance of any type without court order so long as one of the participants to the conversation has consented.

We submit that this Court should at least take this opportunity to resolve this dilemma by making it crystal-clear that *White* was decided prior to *Katz v. United States*, 389 U.S. 347, and as such, is not a precedent for gross violations of the Fourth Amendment and the destruction of a person's reasonable expectation of privacy.

It is respectfully contended that *White* was a plurality opinion of the Supreme Court of the United States and was decided prior to *Katz v. United States*, 389 U.S. 347, 364.

Just a mere plurality of the Supreme Court voted to save the "misplaced confidence" doctrine of *On Lee v. United States*, 343 U.S. 747 and *Lopez v. United States*, 373 U.S. 427.

This "misplaced confidence" exception to the normal warrant requirement is inconsistent with the "reasonable expectation of privacy" standard of *Katz v. United States*, 389 U.S. 347, and we maintain should therefore be abolished. [*See Holmes v. Burr*, 486 F. 2d 55 (9 Cir. 1973), *cert. denied*, 414 U.S. 1116.]

It will be recalled that Justice Black's cryptic concurrence in *United States v. White, supra*, mentioned the fact that it did not apply since this was pre-Katz eavesdropping. (*See Olmstead v. United States*, 277 U.S. 438.)

Justice Black cast the swing vote in *United States v. White*, and his concurrence in the judgment of the court was for the reason set forth in his dissent in *Katz v. United States*, 389 U.S. 347, 364. However, he also noted "his adherence" to "his views expressed in Linkletter v. Walker, 381, U.S. 618". In *Linkletter*, Mr. Justice Black maintained that *Mapp v. Ohio*, 367 U.S. 643, should have been applied retroactively.

It must be borne in mind that in his concurrence in *United States v. White*, Justice Black reasserted the position which he had taken in *Katz*, namely that electronic surveillance was not within the ambit of the Fourth Amendment.

In *Katz v. United States*, however, the Supreme Court made it very clear that seizure of the spoken word was within the purview of the Fourth Amendment and, consequently, Black's concurring and controlling fifth vote is inapplicable in view of *Katz v. United States*.

It is argued that: (1) electronic recording produces more reliable evidence than human recollection; (2) that law enforcement authorities need unhampered electronic surveillance to protect us from crime; (3) that the exclusion of evidence obtained in this way hurts society. These arguments do not hold up.

Evidence obtained by machine is not necessarily more reliable than human recollection. A machine has considerable ability to distort. It focuses on a single element in a total environment and can yield deceptive results. A recorder captures voices without

facial expressions, gestures, and other subtle details. Nor is a picture any more accurate. But the reliability argument really is irrelevant. Evidence obtained by illegal search or seizure is excluded not because of unreliability, but because of the values its exclusion protects.

As for the second argument, the Government's legitimate interest in detecting and preventing crime must be balanced against the individual's freedom from unjustified intrusions. That balance was struck by the draftsmen of the Fourth Amendment when they required advance authorization of searches and seizures by a magistrate upon a showing of probable cause.

Rarely articulated but frequently evinced hostility to the Exclusionary Rule underlies the third argument:

> "The case presents some of the most vexing and pressing problems of our day: What are the constitutional limitations on governmental electronic intrusions into privacy? Do the Fourth and Fourteenth Amendments circumscribe warrantless, electronic intrusions as effectively as they limit corporeal invasions of privacy? Are the protections of the Fourth and Fourteenth Amendments diluted if the person subjected to the warrantless electronic intrusion is suspected of a crime?" (Dissent of Hufstedler, J. in *Holmes v. Burr, supra*).

The dissenting opinion in *Holmes v. Burr, supra,* went on to explain the impact of warrantless surveillance:

> "The corrosive impact of warrantless participant monitoring on our sense of security and freedom of expression is every bit as insidious as electronic surveillance conducted without the consent of any of the parties involved. In terms of the individual's reluctance to speak freely, no qualitative difference exists between the danger posed by third party interception and the risk that his auditor has

> sanctioned a secret recording of their conversation. . . ."

The holding of *Olmstead* was finally overruled in *Katz v. United States.* There the court explained:

> "The Fourth Amendment protects people, not places."

Tucked into *Olmstead* was a passing reference to the theory that persons subject to warrantless electronic interception volunteer their statements to the Government by their very act of talking to each other. This theory later emerged as the constructive consent and assumption of the risk fictions relied on in *On Lee v. United States, supra,* 343 U.S. 753-54 and *Lopez v. United States, supra,* 373 U.S. at 439. In *Lopez,* the majority added the variation that a person talking face-to-face with a known government agent assumes the risk that the agent will be able to repeat the conversation either by total personal recall or by a corroborative recording which in its nature is more reliable than human recollection. The theme was replayed in a slightly different key by the plurality in *United States v. White.*

Using familiar jurisprudential tools, *Holmes* can be successfully distinguished from every Supreme Court decision directly bearing on the case other than *Katz.* Thus, *On Lee* and *Lopez* not only are factually dissimilar but, more importantly, were based on trespassory concepts discredited by *Silverman v. United States,* 365 U.S. 505 (1961); *Osborn v. United States,* 385 U.S. 323; and *Berger v. New York,* 388 U.S. 41 and destroyed by *Katz. Rathburn v. United States,* 355 U.S. 107 (1957), dealt with governmental eavesdropping by extension telephone without electronic recording, and the decision was confined to an interpretation of Section 605 of the 1934 Federal Communications Act (47 U.S.C. §605). *Schwartz v. Texas,* 344 U.S. 199 (1952), involved facts similar to *Rathburn,* but the decision was based on the pre-*Mapp* authority refusing to apply the exclusionary rule to state courts. *Schwartz* was overturned by *Lee v. Florida,* 392 U.S. 378 (1968), a post-*Mapp* case, holding inadmissible under Section 605 telephone conversations overheard on a party line and not recorded. *Lewis v. United States,* 385 U.S. 206 (1966)

and *Hoffa v. United States,* 385 U.S 293 (1966), like *Holmes,* concerned the use of confidants who were secretly governmental informers, but in neither case was electronic surveillance employed. The facts in *White* were closer to those in *On Lee* than to *Olmstead* or *Holmes.* But of much greater significance, *White* necessarily applied pre-*Katz* law because the electronic surveillance of *White* occurred before *Katz* was decided, and *Katz* had been earlier held nonretroactive in *Desist v. United States,* 395 U.S. 244 (1969). *United States v. White,* is nevertheless important because it reveals continuing reliance by some of the justices on the assumption of the risk doctrine. [*See United States v. White,* at 754 of 401 U.S. (White, J.)].

Although the holding in *White* was based upon the nonretroactivity of *Katz,* several of the justices did express views on the effect of *Katz* on participant electronic surveillance. Mr. Justice White, writing for the Chief Justice and Justices Stewart and Blackman, suggested than *On Lee* remained sound law. Justices Brennan, Douglas, Harlan and Marshall each wrote separate opinions arguing that the result in *On Lee* could not survive *Katz.* Mr. Justice Black, concurring in the judgment of the court, did not address this issue, merely reasserting the position taken in his *Katz* dissent that elecronic surveillance was not within the ambit of the Fourth Amendment.

Proponents of the assumption of the risk doctrine, apparently recognizing the significant intrusion upon an individual's privacy caused by participant monitoring, do not say that everyone must anticipate and risk warrantless surveillance; rather, they limit its application to those who contemplate illegal activity. But never do these proponents explain how, absent the Fourth Amendment requirement of antecedent justification before a neutral magistrate, the sinful can be separated from the saintly without probing everyone or leaving the selection to the unbridled discretion of government agents.

Adoption of the assumption of the risk theory ultimately rests on the cynical conclusion that a warrantless search is justified by what it reveals.

In the conclusion of her dissenting opinion, Judge Hufstedler, in *Holmes v. Burr, supra,* set forth cogent argument indicating how destroying a right protected by the Fourth Amendment because of distaste for the remedy, ultimately destroys the Fourth Amendment itself. In 486 F. 2d 55, 58, the dissent explained:

> "Dissatisfaction with the exclusionary rule as the predominate remedy for conduct violating the Fourth Amendment is understandable and defensible. Attacks on the constitutional right of privacy as the means of expressing dissatisfaction with the remedy are intellectually indefensible and dangerous. A constitutional right continuously diluted becomes no right. Destroying a right protected by the Fourth Amendment because of distaste for the remedy makes little more sense than destroying a patient for failure to respond to chosen medication. If the remedy is wrong, it is time to reexamine the remedy, not to diminish the right."

CONCLUSION

We incorporate by reference arguments made below and also adopt the legal arguments contained in the petition of Nunzio Provenzano, a co-defendant at trial who has indicated that he will also petition this Court for certiorari.

We ask that certiorari be granted because of the important issues presented herein.

Respectfully submitted,

IRVING ANOLIK and
DONALD CONWAY
Attorneys for Petitioner

APPENDIX

ORDER OF AFFIRMANCE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 81-2411/12

UNITED STATES OF AMERICA

vs.

PROVENZANO, NUNZIO,

Appellant in No. 81-2411

COTLER, IRVING,

Appellant in No. 81-2412

(D.C. Criminal No. 80-00315-01-04)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE — DISTRICT OF NEW JERSEY

Present: ADAMS and WEIS, *Circuit Judges* and CONABOY, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on June 9, 1982.

---

* Honorable Richard P. Conaboy, United States District Judge for the Middle District of Pennsylvania, sitting by designation.

Order of Affirmance

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court filed July 8, 1981 and appealed at C.A. No. 81-2411 and entered April 28, 1981, July 9, 1981 and July 13, 1981 and appealed at No. 81-2412, be, and the same are hereby affirmed.

ATTEST:

s/ Sally Mrvos
Clerk

September 1, 1982

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ON SUR PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 81-2412

UNITED STATES OF AMERICA

v.

IRVING COTLER,

Appellant

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges,* and CONABOY, *District Judge.**

The petition for rehearing filed by Irving Cotler, Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ Weis
Judge

Dated: Sep. 27, 1982

---

* The Honorable Richard P. Conaboy, United States District Judge for the Middle District of Pennsylvania, sitting by designation.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-2411 and 81-2412

UNITED STATES OF AMERICA
v.
NUNZIO PROVENZANO,
Appellant in 81-2411
and
IRVING COTLER,
Appellant in 81-2412

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(D.C. Crim. Nos. 80-00315-01 and 30-00315-04)

Argued June 9, 1982

Before: ADAMS and WEIS, *Circuit Judges* and CONABOY,* *District Judge*

(Opinion filed September 1, 1982)

Gerald L. Shargel, Esq. (Argued)
150 East 58th Street
New York, New York 10022

Jay Goldberg, Esquire
230 Park Avenue
New York, New York 10169
Attorneys for Appellant
Nuzio Provenzano

---

*The Honorable Richard P. Conaboy, United States District Judge for the Middle District of Pennsylvania, sitting by designation.

Irving Anolik, Esq. (Argued)
225 Broadway
New York, New York 10007

Donald R. Conway, Esquire
75 Essex Street
Hackensack, New Jersey 07106
Attorneys for Appellant
Irving Cotler

W. Hunt Dumont, Esq. (Argued)
United States Attorney
Thomas L. Weisenbeck, Esq.
Maryanne Trump Desmond, Esq.
Assistant U.S. Attorneys
Federal Building
970 Broad Street — Room 502
Newark, New Jersey 07102
Attorneys for Appellee
United States of America

OPINION OF THE COURT

WEIS, *Circuit Judge.*

In this appeal from their RICO convictions, defendants raise a number of issues, including denials of a severance, denial of psychiatric examinations of government witnesses, and defective affidavits supporting warrants for wiretaps. Another complaint is that not all of the twelve grand jurors who voted for indictment attended every session at which evidence was received. Although we do not find that circumstance sufficient to vitiate the indictment, we suggest that in the future, grand jury absentees be required to read transcripts of missed sessions. There being no reversible error in any of defendants' contentions, however, we permit the convictions to stand.

Opinion

Appellants and two others were indicted for violations of 18 U.S.C. §1962(c), as well as conspiracy. The charges arose out of defendants' activities in obtaining illegal payments from four trucking companies in order to secure labor peace. After a lengthy jury trial, two of the defendants were convicted. Two others were acquitted.

Appellant Nunzio Provenzano served in various capacities in Teamsters Union Local 560 in northern New Jersey, progressing from business agent to secretary-treasurer, and then to president in 1975. The other appellant, Irving Cotler, was the owner of several trucking companies which had no contracts with Local 560. During the period covered by the indictment, the labor contract between Local 560 and signatory companies contained a "city man rule." This provision required any trucking company hauling iron, steel, and special commodities within the jurisdiction of Local 560 to secure express authorization for its operations from the union. Absent such permission, a company was required to utilize the services of a Local 560 "city man" during pickup and delivery.

Ray Dee acted as the North Jersey agent for All States Trucking Company. In 1972, after Provenzano became the union's business agent, the permanent "city man" assigned to All States was discharged. Sometime after this, Dee began making payments to defendant Cotler in exchange for All States' freedom to operate without the use of a city man. In 1975, All States expanded its operation, and began using an additional agent named Joe Mabus. He made payments to Provenzano through another intermediary until he was imprisoned in early 1975. After that occurred, Mabus made no further payments, and a few months later, Local 560 struck All States. The strike ended when All States' president discharged Mabus and agreed to use city men. The Ray Dee agency's transactions, however, were not affected by the strike.

About a year later, All States' vice-president met with Provenzano in a preliminary step to reopen an iron and steel agency in Local 560's area. The company's overtures were rejected until a few weeks later when Ray Dee, Jr. arranged a meeting between the vice-president and Cotler. For $100 per day, Cotler said All States would not need a city man for any of its shipments. He then took the vice-president to Local 560's office, where they conferred with Provenzano, who stated that Cotler was a "good friend" and advised the vice-president to "listen to what he is telling you." For the next three years, All States arranged to have Ray Dee, Jr. pay Cotler $100 per day in addition to Dee's own payments to protect his agency.

In 1975, another trucking company, T.I.M.E.-D.C., began special commodity operations in North Jersey and hired Joe Szapor as its agent. Through Teamster contacts, Szapor had a meeting with Provenzano and three other men. The agent was assured he would be contacted, and sometime later, Szapor was introduced to Cotler. Cotler said he would be collecting for Local 560, and told Szapor not to travel to the union. During the next year, Cotler was given $500 per month and T.I.M.E. was able to avoid using city men.

When T.I.M.E.'s business began to prosper, Cotler said the monthly payment should be increased. T.I.M.E. acquiesced and continued to make pay offs until April 1979. During this same period, T.I.M.E. had a number of grievances with Local 560. Szapor protested to Provenzano about these problems since T.I.M.E. was making its regular payments. Provenzano told Szapor to resolve the grievances at the terminal level. When Szapor then spoke to a Local 560 business agent, the grievances were settled.

Between 1977 and 1979, similar arrangements were made with two other trucking companies, Helms Express and Mason and Dixon, which paid Cotler through the Szapor and Ray Dee agencies, respectively.

Mason and Dixon paid a fixed weekly fee, but Helms was required to remit a percentage of its revenues.

The jury convicted Cotler and Provenzano on both counts of the indictment. On appeal, the defendants allege numerous trial errors. Cotler contends he was prejudiced by denial of his motions for severance made both before and during the trial. He also asserts that the warrants used to secure court-authorized wiretaps were not supported by adequate grounds. He further argues that the district court erred in refusing to order psychiatric examinations of Ralph Picardo and Joseph Szapor, two witnesses who testified for the government. Finally, he contends his privacy rights were violated by Szapor's use of recording devices during their conversations.

Provenzano also argues that there should have been a severance. In addition, he contends that there was insufficient evidence to show that the "enterprise" was conducted "through a pattern of racketeering activity" as required by RICO. As his last point, he asserts that the trial judge erred in declining to disclose grand jury minutes and transcripts. The defense contends that there were two justifications for disclosure. First, some of the witnesses who testified before the first grand jury were not called before the succeeding indicting grand jury; and second, not all of the twelve jurors who voted for indictment were present at every session of the indicting grand jury.

I. THE SEVERANCE ISSUE

A.

Cotler argues that he was the victim of a concerted attack at trial by the other three defendants, which, when combined with the government's effort, meant that he was being prosecuted by four parties instead of one. He points to the other co-defendants' derogatory remarks about him and their efforts to disassociate themselves from him at the trial. In particular, Cotler says

that the co-defendants' tactics in taking the witness stand, and their pointed comments about being unable to cross-examine him, emphasized his decision not to testify.

We are not persuaded, however, that there was a real antagonism in the defense strategies of this case. Rather, they were complementary, for if the jury had been persuaded that Cotler alone received the payoffs and was unconnected with any of the other defendants, there would have been a failure of proof on the conspiracy and RICO counts. Not only his co-defendants, but Cotler as well, would have walked away from the indictment had sole culpability been fastened on him.

In short, the "ganging up" theory is unconvincing when it is realized that Cotler stood to benefit if the jury accepted the co-defendants' theory that he was off on a frolic of his own. Indeed, in his summation, Cotler's counsel argued that none of the money went to any of the co-defendants. In light of the overwhelming evidence against Cotler, putting as much distance between him and the defendant union officials was probably the best strategy to avoid conviction.

Cotler relies on *United States v. Crawford*, 581 F.2d 489, 491 (5th Cir. 1978), to support his contention that antagonistic defenses can prejudice co-defendants to such a degree that they are denied a fair trial. But, as the court in *Crawford* noted, such defenses must conflict "to the point of being irreconcilable and mutually exclusive." *Id.* (citations omitted). That is just not the situation here. In *United States v. Barber*, 442 F.2d 517, 530 (3d Cir.), *cert. denied*, 404 U.S. 846 (1971), we rejected a similar argument saying, "the mere presence of hostility among defendants" is insufficient to require separate trials. That is especially true in this case, where the hostility exhibited at the trial, if accepted by the jury, would be advantageous to the co-defendants.

B.

Provenzano takes a different tack on the severance issue. He contends that if there had been separate proceedings, Cotler would have testified. The fact that the trials were joined, and that Cotler exercised his right not to testify, Provenzano argues, amounted to an infringment on his rights of confrontation and compulsory process. At an earlier stage in the joint trial, Cotler's attorney did represent to the court that if there were separate trials, Cotler would take the stand at the request of any defendant. Counsel apparently later had second thoughts on this matter and declined to proceed nonjury as to Cotler's own case. Provenzano reasons that if Cotler had been tried first, there would have been no fifth amendment problem thereafter. But a defendant cannot compel a co-defendant to testify even if their trials are severed, *United States v. Barber*, 442 F.2d at 529, so more than a possibility that a co-defendant will testify is required. *See United States v. Rosa*, 560 F.2d 149, 156 (3d Cir.), *cert. denied*, 434 U.S. 862 (1977).

We are not persuaded by Provenzano's contention that he was substantially harmed by inability to use cross-examination to blunt or weaken the force of statements made by Cotler and admitted into evidence as those of a co-conspirator. We note that as a result of the chambers' conference between counsel and the trial judge, it was agreed that co-defendants' counsel could comment in final arguments on their inability to call Cotler as a witness. However, counsel was not to argue that there could be any inference of guilt against Cotler because of his failure to testify. *See United States v. Addonizio*, 451 F.2d 49, 62-63 (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972). We are not convinced that cross-examination of Cotler would have aided the co-defendants more than counsels' comments about their inability to cross-examine him.

In *United States v. Boscia*, 573 F.2d 827, 832 (3d Cir.), *cert. denied*, 436 U.S. 911 (1978), we outlined four factors that a district court should consider in deciding whether a severance should be granted:

1. The likelihood of co-defendant testifying;
2. The degree to which such testimony would be exculpatory;
3. The degree to which the testifying co-defendant could be impeached;
4. Judicial economy.

It is apparent that on the record of this case items one and four have not been satisfied.

At one point, it appeared that Cotler would testify if the trials were severed. However, his attorney's later rejection of a suggestion that Cotler proceed non-jury indicates uncertainty that he actually would take the witness stand if a severance had been granted. Although Cotler's counsel did indicate that his client's testimony would be exculpatory in nature for Provenzano, Cotler would also be subject to impeachment, particularly if he had been tried first and convicted. Finally, judicial economy concerns were present, and in a case of this nature, it is preferable to have all of the parties tried together so that the full extent of the conspiracy may be developed. *See United States v. Rosa*, 560 at 156; *United States v. Reicherter*, 647 F.2d 397, 399 (3d Cir. 1981); *United States v. Armocida*, 515 F.2d 29 (3d Cir.), *cert. denied*, 423 U.S. 858 (1975); *United States v. Somers*, 496 F.2d 723, 731 (3d Cir.), *cert. denied*, 419 U.S. 832 (1974).

We similarly find no merit to Cotler's contention that there was a misjoinder under Fed. R. Crim. P. 8. His argument is that a misjoinder was shown because there was a variance between the conspiracy charged in the indictment and the proof adduced at the trial. The record does not support this assertion and, in any event, it is foreclosed by *United States v. Somers*, 496 F.2d at

729, where we rejected the position that is asserted here. Thus, neither defendant has demonstrated any abuse of discretion by the trial court. We therefore find no error in the district court's refusal to sever the cases.

II. THE RICO COUNT

Provenzano argues that the government failed to prove that a nexus existed between the enterprise — Local 560 — and the pattern of racketeering activity. According to his theory, the statute is not satisfied unless it is shown that the enterprise was advanced or benefitted by the pattern of racketeering activity. He contends that even though the record would establish that he personally profited from payoffs, the interests of the union were not advanced. Thus, his actions in fact worked to the detriment of the union and were contrary to the obligations of his office.

The statute, 18 U.S.C. §1962(c) provides in pertinent part:

> "It shall be unlawful for any person employed by . . . any enterprise . . . the activities of which affect interstate . . . commerce, to conduct or participate, . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . ."

Defendant relies upon *United States v. Webster*, 639 F.2d 174, *cert. denied*, —— U.S. —— (1981). There, a panel of the Court of Appeals for the Fourth Circuit at first held that the statute does not extend to a "situation where the racketeering activities are advanced through the assistance of the enterprise." *Id.* at 184. The court focused on the word "through" in the statutory language, and reasoned that in order to conduct an enterprise's affairs "through" a pattern of racketeering activity, the enterprise's affairs must necessarily be advanced by the racketeering. *Id. See also* Note, 12 Seton Hall L.Rev. 116 (1981). Nor did the court find any evi-

dence of congressional intent to reach cases where "the racketeering activity made use of the resources of the enterprise but did not provide the enterprise with any benefit. . . ." *Id.* at 184.

The panel later modified its original opinion, however, finding instead that the proper question should have been whether the affairs of the enterprise "were *conducted* through the pattern of racketeering activity, not whether they were benefitted or advanced or whether profit to the [enterprise] resulted." 669 F.2d 185, 186-87 (4th Cir.), *cert. denied*, —— U.S. —— (1982).

We agree with the Fourth Circuit's latter interpretation of the relevant statutory language. The record here demonstrates that, by accepting bribes in exchange for allowing violations of the collective bargaining agreements to be overlooked, Provenzano was conducting his union office through racketeering activity. The fact that the union was harmed rather than benefitted does not remove the conduct from RICO's ambit.

A similar situation is presented when public officials accept bribes in the course of their duties. Thus, in *United States v. Frumento*, 563 F.2d 1083 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978), the convictions of state officials who participated in a cigarette smuggling conspiracy to the detriment of the "enterprise," the state itself, were affirmed. Similarly, convictions were upheld in *United States v. Salvitti*, 451 F.Supp. 195 (E.D. Pa.), *aff'd mem.*, 588 F.2d 822 (3d Cir. 1978) (Executive Director of Redevelopment Authority of Philadelphia — acceptance of bribes); *United States v. Vignola*, 464 F.Supp. 1091 (E.D. Pa.), *aff'd mem.*, 605 F.2d 1199 (3d Cir. 1979) (Traffic Court judge — acceptance of bribes). Although these cases did not state that there can be culpability without benefit to the enterprise, that premise is implicit in the convictions which were affirmed.

In *United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981), the defendant, a union officer, received illegal labor payoffs. The Court

of Appeals for the Second Circuit held that one conducts the activities of an enterprise through a pattern of racketeering when:

> "(1) One is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise; or
>
> (2) the predicate offenses are related to the activities of that enterprise."

Id. at 54. It is only when the predicate acts are unrelated to the enterprise or the actor's association with it that the nexus element is missing, and consequently there is no RICO violation. That is clearly not the situation presented here. Provenzano was able to circumvent the bargaining agreement because of his position in the union, and the payoff scheme was related to the union's activities, albeit in a detrimental manner.

That rationale is consistent with our approach in *Frumento* and the district court cases of *Salvitti* and *Vignoli*. *See also* B. Tarlow, *Rico: The New Darling of the Prosecutor's Nursery*, 49 FORD. L.REV. 165, 228-34 ((1980). Accordingly, the trial judge did not err in submitting the RICO counts to the jury.

III. GRAND JURY ISSUES

Before trial, all of the defendants moved for disclosure of the transcripts of grand jury attendance records and voting tallies. The defendants urged two grounds as justification. First, they believed the indicting grand jury may have relied on summaries of testimony before the original grand jury, which had heard evidence in the case, but whose term expired before the indictments were returned. The second ground was that not all of the twelve jurors

who voted for indictment had attended every session of the grand jury.

A.

The district court accepted the response of the government that the first grand jury heard testimony from 19 individuals. The second grand jury heard testimony from 51 people, two of whom had also appeared before the first grand jury. The testimony of a third prior witness was read in full to the indicting jury. No summaries were used before the second grand jury, but it had the opportunity to review all of the testimony received by the first. Because not all of the witnesses who appeared before the first grand jury testified before the indicting jury, Provenzano analogizes the procedure to the use of summaries. The district court recognized that abuse could occur through the use of successive grand juries, but did not find any to exist in this case.

We have indicated our concern with the practice of having a number of grand juries hear testimony which the indicting grand jury ultimately uses as a basis for indictment. *See United States v. Helstoski*, 635 F.2d 200, 202 & n.2 (3d Cir. 1980). We do not think that in this case, however, the district judge erred in refusing the defendant's request for disclosure of the grand jury transcripts.

The government justified its conduct by claiming that the investigation had taken a new turn after the second jury was impanelled. The large number of witnesses called by the indicting grand jury and the few recalled from the first group support that contention. In addition, extensive proceedings before the indicting grand jury are consistent with a complete and legitimate inquiry into the charges. Because of the number of persons called before the

indicting jury, it does not appear that the government was being "selective" when it chose to limit the number of witnesses from the first to appear before the second. We conclude, therefore, that the trial judge properly determined that defendants had not demonstrated particularized need for breaching grand jury secrecy.

B.

A more difficult question is presented by the other complaint against the grand jury — that not all who voted for the indictment had attended all of the 23 sessions. The district judge examined the voting tallies and attendance records *in camera*, and found that out of the twelve votes necessary under Fed. R. Crim. P 6(f), three of the voting jurors attended every session, four missed one session each, three were absent from two sessions each, and two jurors were not present three sessions each.

Although there was not a perfect attendance record for the twelve voting jurors, the district judge, relying on *United States v. Leverage Funding Systems, Inc.* 637 F.2d 645 (9th Cir. 1980), *cert. denied*, 452 U.S. 961 (1981), held that neither the Fifth Amendment nor the Federal Rules of Criminal Procedure imposed such a requirement. As long as a quorum was present at every session and at least twelve jurors voted to indict, both the Constitution and the rules were satisfied. The court did concede that there may be a situation where a grand juror missed so much of the evidence that the Fifth Amendment would not permit his vote to be counted, but found no such demonstration had been made here. As an additional reason for denying the defendant's motion, the court pointed out the undesirability of holding "preliminary" trials to determine the competency and adequacy of the evidence before the grand jury.

The necessity for insuring that the grand jury be informed of all the evidence cannot be ignored. As the Supreme Court said in *Wood v. Georgia*, 370 U.S. 375, 390 (1962), "[the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution." It is that body which determines whether "a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." We have rejected the proposition that the grand jury is simply a prosecutor's tool and have noted its constitutional role as a shield against unjustified charges. *See United States v. Goldstein*, 502 F.2d 526 (3d Cir. 1974) (in banc); *United States v. Serubo*, 604 F.2d 807 (3d Cir. 1979); *In re: Grand Jury Proceedings (Schofield)*, 486 F.2d 85 (3d Cir. 1973). Yet it is clear that the criminal process must not be bogged down by extensive pretrial review of grand jury activity. *United States v. Calandra*, 414 U.S. 338 (1974); *Costello v. United States*, 350 U.S. 359 (1956).

The district court's opinion in *United States v. Leverage Funding Systems, Inc.*, 478 F.Supp. 799, 801 (C.D. Cal. 1979), stated that if the grand jury was to fulfill its role as an independent body, at least twelve grand jurors who voted to indict should have been informed of all the evidence submitted. In that case, nine jurors were present at all 13 sessions, five were present at 12, two for 11, and two were present at nine sessions, while one was present for only six. The district judge discounted the votes of the absentee jurors, finding that a grand juror cannot be considered informed unless he attends all sessions at which evidence is presented on the proposed indictment. *Id.* at 803. A divided panel of the Court of Appeals for the Ninth circuit reversed, observing that a grand juror's function is to decide whether probable cause to believe that a crime has been

committed exists. 637 F.2d at 648. The appellate court believed that this duty could be performed even if a grand juror was absent during the presentation of some exculpatory evidence.

The Second Circuit in *United States ex rel. McCann v. Thompson*, 144 F.2d 604 (2d Cir.) *cert. denied*, 323 U.S. 790 (1944), expounded the approach later adopted by the Ninth Circuit, observing that since it is quite remote that exculpatory evidence would be presented to a grand jury, it is unlikely that a defendant would be harmed by the absence of a grand juror. The absentee would merely not have heard all of the inculpatory evidence. The court in *United States v. Colasurdo*, 453 F.2d 585, 596 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972), reaffirmed this position, adding that to permit a review of attendance from voting records "would bog down the courts in a morass, a veritable jungle of speculation and conjecture."

United States v. Lang, 644 F.2d 1232, 1235 (7th Cir.), *cert. denied*, —— U.S. —— (1981), said that the requirements of Rule 6 belied any intention of imposing a perfect attendance requirement, for the rule only mandates that a quorum be present at every session. The court also noted that Congress had acted to extend grand jury terms to allow adequate investigations of complex criminal activity. To invalidate indictments because of jury attendance would frustrate that congressional intent. *Id.* at 1238.

The reasons advanced by the appellate courts which have considered the problem are weighty ones but, nevertheless, leave us somewhat uneasy. It is indeed speculative to consider what bit of evidence might have persuaded a grand juror to vote for or against an indictment. But the grand juror's judgment is what the Constitution requires, and the defendant is entitled to an informed determination of probable cause.

We recognize the practical problems created by the very nature of the grand jury's investigative role. Not all

the evidence can be presented at one time — one witness' testimony may lead in turn to an investigation that extends over a period of time. Some witnesses may be unavailable at a given point and other circumstances may hinder prompt expedition. The longer the period of service, the more absences may be expected.

The provisions of Rule 6(e)(1), which require the recordation of grand jury proceedings, aid us in reaching agreement with the solution proposed by the *Lang* court. As its opinion observed, "[p]rosecutors can insure that the perception of fairness, as well as its substance, are maintained by giving replacement and absent grand jurors the opportunity to review transcripts . . . of missed sessions. That should go a long way to ameliorate the concerns raised here." 644 F.2d at 1239.[1] If a review of the transcripts should raise questions in a juror's mind which could be resolved by recalling a witness, that alternative would be available. Following this procedure would insure that each grand juror is fully informed of the evidence which has been presented.

It would have been better to utilize such a practice in this case, but we cannot say that failure to do so vitiates the indictments. We rely on the judgment of the district judge who had the opportunity to review the grand jury records *in camera*. The grand jury here had 23 separate sessions, and although the number of absences may border the limits of acceptability, it does not reach the point where we must say that the defendant's rights have been violated. As we note above, furnishing transcripts to absent jurors is a practical way to avoid attacks on grand jury voting in the future.

In view of all the circumstances here, we conclude that the district court did not err in its refusal to unseal the grand jury records.

---

1. Although the court approved the summaries as an alternative, we do not recommend their use unless for some valid reason transcripts are not available.

IV. PSYCHIATRIC EXAMINATION OF WITNESSES

Before trial, Provenzano's attorney submitted a motion requesting psychiatric examinations of government witnesses Ralph Picardo and Joseph Szapor. Supporting the motion was an affidavit which stated that Picardo had been branded a "liar," a "little crazy", "off-the-wall", and "a pathological liar," by a number of government witnesses in an earlier unrelated trial. In addition, after his conviction in February of 1975 for murder, Picardo was confined for psychiatric examination at the New Jersey State Prison at Trenton. As to Szapor, the defense recited a number of bizarre actions and an allegation that drugs prescribed for treatment and pain may have affected his competency and credibility.

The trial judge refused to order the examinations, finding that the attacks posed a credibility issue for jury resolution. Cotler now asserts that the denial of his motion was an abuse of discretion. The defendant concedes that the question of credibility is ultimately one for the jury, but argues that the opinion of a psychiatrist would be helpful in the deliberations.

We note that both witnesses were extensively cross-examined. As a result, the jury heard about Picardo's murder conviction and his cocaine and marijuana use, that he used relatives without their knowledge to further his criminal schemes, and that he believed self-preservation was "the name of the game." The record also demonstrates his incentive to furnish information to the federal authorities in order to avoid state prosecution.

The cross-examination of Szapor was so effective that the trial judge commented that the witness's credibility was "certainly placed in doubt not only by the evidence offered by the defendants, but certainly as a result of his cross-examination. . . ." Thus, the evidence before the jury provided ample information for its task of evaluating the truthfulness of the two witnesses.

We find no abuse of discretion in the judge's refusal to order the psychiatric examinations. In *United States v. Pacelli*, 521 F.2d 135, 140 (2d Cir. 1975), *cert. denied*, 424 U.S. 911 (1976), the court said that the question is within the discretion of the trial judge and will not be disturbed unless it is plainly in error. We adopt that standard also.

Even if the examination had been ordered, it is doubtful at best that psychiatric testimony would have been appropriate here. The use of such evidence at trial to attack or support a witness's credibility has not been generally favored. In *United States v. Barnard*, 490 F.2d 907, 912 (9th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974), the court emphasized the jury's responsibility to assess credibility. Doubting that psychiatrists have more expertise in this field than juries, the court pointed out that such expert testimony might cause jurors to surrender their common sense in weighing the evidence and could produce a trial within a trial. The court concluded that this type of testimony should only be received in unusual cases. *Id.* at 913. The record in this case did not establish anything so out of the ordinary as to require — or indeed justify — the use of psychiatric testimony. The eccentric behavior that might have been deemed significant by a psychiatrist was fully explored before the jury. *See also, United States v. Jackson*, 576 F.2d 46, 48-49 (5th Cir. 1978); *United States v. Russo*, 442 F.2d 498 (2d Cir. 1971), *cert. denied*, 404 U.S. 1023 (1972).

V. OTHER MATTERS

Cotler also contends that the affidavits supporting the issuance of warrants for wiretapping and searches were inadequate. In particular, one affidavit is alleged to contain 26 pages of irrelevant and prejudicial material. When that material is deleted, however, adequate probable cause is demonstrated. *See United States v. Sterling*, 369 F.2d 799 (3d Cir. 1966). We are not persuaded

that the alleged prejudicial aspects unduly influenced the judge who issued the warrants. The defendant's contention that the evidence should have been suppressed was properly rejected by the trial court.

Finally, defendant Cotler asserts that his right to privacy was violated by the consensual recordings made by witness Szapor. We find no merit to this contention. *See, e.g., United States v. Armocida*, 515 F.2d 29, 51-52 (3d Cir.), *cert. denied*, 423 U.S. 858 (1975).

Accordingly, the judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourth Amendment, United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment, United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law. . . ."

18 U.S.C. §1961(4):

> " 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity[.]"

18 U.S.C. §1962(c):

> ". . . any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

Relevant Constitutional and Statutory Provisions

18 U.S.C. §1962(a):

"(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity of the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities or any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer."

18 U.S.C. §1962(b):

"(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

Relevant Constitutional and Statutory Provisions

18 U.S.C. §1962(d):

"The final substantive RICO crime makes it 'unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section.' "

Federal Rules of Criminal Procedure Rule 8(b):

"(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

Federal Rules of Criminal Procedure Rule 14:

"Rule 14. Relief from Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial."